UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PAULETTE JONES,

Plaintiff,

09 Civ. 4815

-against-

OPINION

NEW YORK CITY BOARD OF EDUCATION, BRIAN KAPLAN, GERRI COOKLER, JEAN McTAVISH, DAVID BRODSKY, MARCEL KSHENSKY, ALEX TARE, and SUSAN MANDEL,

Defendants.

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4/2/12

A P P E A R A N C E S:

Attorneys for Plaintiff

LAW OFFICES OF AMBROSE W. WOTORSON, P.C.
26 Court Street
Brooklyn, NY 11201
By: Ambrose Wotorson, Esq.

Attorneys for Defendants

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
By: Jane E. Andersen, Esq.

**Sweet, D.J.**

The defendants New York City Board of Education ("BOE"), Brian Kaplan ("Kaplan"), Gerri Cookler ("Cookler"), Jean McTavish ("McTavish"), David Brodsky ("Brodsky"), Marcel Kshensky ("Kshensky"), Alex Tare ("Tare") and Susan Mandel ("Mandel" and, collectively with BOE, Kaplan, Cookler, McTavish, Brodsky, Kshensky and Tare, the "Defendants") have moved pursuant to Fed. R. Civ. P. 56 for summary judgment dismissing the amended complaint (the "Amended Complaint") of the plaintiff Paulette Jones ("Jones," or the "Plaintiff"). The Amended Complaint, which pleads violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. ("ADEA"), alleges that the Defendants discriminated against Jones on the basis of race and age and retaliated against Jones when she complained about the discrimination.

On the facts and conclusions set forth below, the Defendants' motion for summary judgment is granted, and the Amended Complaint is dismissed.

**Prior Proceedings**

Jones filed her initial complaint on May 22, 2009 and the Amended Complaint on September 2, 2009. The Amended Complaint alleges that Jones was discriminated against when she was assigned to work with students taking the GED predictor tests, that the increase of duties in this area coupled with a decrease in her duties involving the counseling of students diminished her professional responsibilities. Jones further alleges that she was retaliated against for complaining about discrimination by not being timely paid for her work during the summer of 2008 and by being denied a summer position in 2009.

On June 9, 2011, the Defendants moved for summary judgment. After argument was delayed by stipulation of the parties, the motion was heard and marked fully submitted on November 1, 2011.

**The Facts**

The facts are set forth in the Defendants' Local Rule 56.1 Statement and the Plaintiff's 56.1 Statement and are not in dispute except as noted below.

The Plaintiff self-identifies as African-American, and her date of birth is August 14, 1946. She began her employment

at the BOE in or around January 1981, as a special education teacher. In or around January 1997, the Plaintiff became employed in the title of guidance counselor and served in that title until her retirement in September 2010. According to the Plaintiff, Jones also taught special education high school students in the Manhattan district for seventeen years before becoming a guidance counselor/related services counselor. To be a guidance counselor, one must have sixty master's credits in counseling, permanent certification and no unsatisfactory ratings. When the Plaintiff first became employed as a guidance counselor for the BOE, she was assigned to work in multiple schools during a school year, and her supervisor was a licensed master social worker. In the fall of 1998, Plaintiff was granted a seniority transfer to the Edward A. Reynolds West Side High School ("West Side High School") as a guidance counselor/related service counselor.

In 2003, the BOE reorganized, the Plaintiff was assigned directly to West Side High School and the Plaintiff's supervisor became the school's principal. McTavish has served as the principal at West Side High School from 2001 to the present and was Plaintiff's rating officer from 2003 until 2010. At all times, McTavish rated the Plaintiff's performance as satisfactory. At no time during the Plaintiff's employment at

West Side High School did the Plaintiff ever receive disciplinary charges, a reprimand, a negative employment evaluation or a negative letter to her personnel file.

West Side High School is an alternative high school. The students who attend West Side High School are between the ages of seventeen and twenty-one, and have been unsuccessful at other high schools, often times due to very serious life circumstances that have prevented them from graduating. Pursuant to New York State law, a student may only attend high school until the age of twenty-one, or until they obtain a high school diploma or a General Educational Development ("GED") diploma.

An Individualized Education Program ("IEP") is required for any student who has a disability. A student's IEP mandates what services are required to be offered by the school. Many of the students at West Side High School are mandated to have counseling services for psychological or other serious emotional problems ("mandated students"). In addition, non-mandated students also have access to the school's counseling services. While social workers and guidance counselors have different licenses, they are both able to provide counseling services to mandated and non-mandated students.

After the BOE reorganized in 2003, West Side High School employed one other guidance counselor in addition to the Plaintiff, Rita Zweifach ("Zweifach"), and one social worker, Linda Salazar ("Salazar"). McTavish hired a second social worker, Delores Rivers ("Rivers"). McTavish knew Rivers because she had hired her when she was an Assistant Principal at the BOE's Project BLEND and worked with her there for a number of years. The race of Rivers is African-American, and she was born in the year 1955. According to the Defendants, while the Plaintiff and Salazar continued to see mandated students after 2003, Rivers had the largest caseload of mandated students for counseling services.

According to the Plaintiff, in January 2003, McTavish attempted to replace Jones with Rivers, who is younger and has four years' experience, telling the Plaintiff that she did not want the Plaintiff at the West Side High School. Subsequently in 2003, McTavish began ordering the Plaintiff to administer GED predictor tests. According to the Defendants, soon after the BOE's reorganization in 2003, the Plaintiff, on her own initiative, began providing students the opportunity to take the GED predictor test, which provides students with an opportunity to practice the GED exam to determine whether they are prepared

to take the exam, and to help identify the areas in which students need to focus further study. The Plaintiff has denied this assertion and has stated that, in 2003, McTavish began ordering the Plaintiff to administer GED predictor tests. The Plaintiff states that she did not administer the GED test in advising students and was following McTavish's orders to test students and score the tests. According to the Plaintiff, Jones rarely discussed the exam and/or after school plans with the students.

Once GED after school classes began, McTavish reduced the Plaintiff's caseload of mandated students. The Plaintiff alleges that, in 2003, Jones had approximately twenty to thirty mandated students in her guidance counselor/related services position. However, by 2007, Jones had only ten to fifteen mandated students. In September 2009, the Plaintiff administered 379 GED sessions and by June 2010, the Plaintiff's mandated student caseload was reduced to two students.

According to the Defendants, McTavish believed that the Plaintiff provided a very valuable service to the students at West Side High School, and she encouraged Plaintiff to work with students to prepare for the GED test. The Plaintiff has denied this assertion. The Defendants state that the Plaintiff

was successful in working with students to take the GED predictor exam and worked hard to ensure that the students would sign up and attend the GED official exam. The Plaintiff denies that she worked hard to ensure that the students would take the exam, instead stating that her responsibilities included simply administering and grading the exam and telling students their scores. According to the Defendants, guidance counselors, unlike social workers, may also be assigned to help students in other areas aimed at their academic success, which may include such things as helping students with their course schedules and counseling students with their post-graduation plans.

According to the Defendants, in September 2006, Salazar left West Side High School, and McTavish hired two social workers to replace her, Beth Bitton ("Bitton") and Jeffrey Fennely ("Fennely"). Bitton had been a social worker at the Ryan Center and previously worked as an intern at West Side High School. The Ryan Center is a school-based health clinic, and the students at the Ryan Center are faced with many of the same challenges as the students at West Side High School face. Fennely had been highly recommended by a former colleague of McTavish's, and had previously worked at the Children's Aide Society, a community based organization to which students are referred to meet a student's counseling needs. Britton and

Fennelly, who had been at West Side High School for less than five years, were both assigned to handle special education students, whom the Plaintiff previously handled. According to the Plaintiff, the decision to transfer the Plaintiff's special education mandated students to social workers was done without any notice to the Plaintiff, who noticed that she was getting fewer special education mandate students and doing more GED testing. The Plaintiff alleges that there were other guidance related duties to which could have been assigned to the Plaintiff.

In 2006, Zweifach retired. According to the Defendants, at all times since 2006, West Side High School has employed only one guidance counselor, the Plaintiff. West Side High School has continued to support two to three social work interns each year from local universities, who counseled students under the supervision of one of the West Side High School social workers. According to the Plaintiff, at the time of her employment, Jones was the only permanent African-American certified counselor and licensed mental health counselor at West Side High School. The Plaintiff alleges that the assignment of GED testing responsibilities limited the Plaintiff's opportunities to address the general guidance counselor skills needed in more affluent schools. As a result, the Plaintiff

states that she was deprived of using her counseling skills. Furthermore, the Plaintiff alleges that she was unable to hone basic and important computer skills possessed by other guidance counselors, and her schedule prevented her from applying for per session work because she was working 8am to 5pm and could not attend educational and workshop meetings that would have enhanced her professional knowledge.

According to the Defendants, while both the Plaintiff and West Side High School's social workers had been providing counseling to mandated students, McTavish believed that the students who attend West Side High School are better served when they are provided counseling from a social worker, as opposed to a guidance counselor. The Defendants claim that McTavish believes that guidance counselors and social workers take different approaches when counseling students. Based on her personal observations, McTavish believes that social workers are better able to work with students to find solutions to their problems, permitting the students to perform better at school. Social workers, according to McTavish, take a more holistic approach to the student's needs and confront issues more directly with the students. The Plaintiff has denied these assertions.

According to the Plaintiff, pursuant to Article 7 Section B of the Department of Education Guidance Counselor Agreement, "Counselors shall not be required to schedule and administer large-scale testing programs or to score and record test data resulting from such programs...." In addition to being barred from administering, grading, and scoring tests, "counselors shall not given any administrative assignments such as but not limited to lunch, hall, bus, or yard duty." The Plaintiff states that Angela Reformato ("Reformato"), who worked in a GED after school program, has more than 32 years of service and is familiar with GED programs, testified during a grievance hearing on December 12, 2008 that GED testing is a job done by a school aide. According to the Plaintiff, Jones has attended to a series of additional administrative duties associated with administering the GED exam including, but not limited to, answering phone inquiries, copying, faxing and responding to staff members' inquiries concerning the GED status of their students.

In or around September 2007, the Plaintiff attended a meeting where she spoke to Cookler, who the Plaintiff testified introduced herself as a guidance counselor content expert for the BOE. When asked during her deposition what she said to Cookler, the Plaintiff testified:

> I was concerned that I'm doing a lot of GED testing and not dealing with my mandated students and [Cookler] stated that [she] would be willing to come to schools and I said that I think that it's very important that [Cookler] come to this school and let them know that [plaintiff's job duties of GED testing] is very dangerous and its' really out of compliance.

After not hearing from Cookler, the Plaintiff testified that she contacted Cookler's superior, Kaplan. In an email dated February 4, 2008, Kaplan, who, at the time served as senior youth development director of the Manhattan Integrated Service Center, sent an email to the Plaintiff, which stated in part:

> From your voice mail, it seems that you think you're being asked to do something out of your license and/or contractual area.
>
> Related service provider is not a license or specific, defined role in a school. If you're hired as a GC [guidance counselor] or a SW [social worker], that's what your role is. If you're working with mandated counseling students, that's part of the role of a GC or SW. Sometimes principals hire GC's and/or SW's to work solely within the role of related service provider, however this does not preclude your working in other areas that GC's and/or SE's do.

In response to the Plaintiff's request, on February 26, 2008, Kaplan and Cookler met with the Plaintiff at West Side High School. Kaplan testified that it was his usual practice to provide a guidance counselor with his observations and

recommendations after meeting with a school guidance counselor. In an email to the Plaintiff dated February 28, 2008, Kaplan expressed "a number of serious concerns about the role of guidance consoler services at West Side High School," and detailed his concerns. The email stated "Your [plaintiff] role in providing much needed guidance services related to the GED program at [West Side High School] is noted by the principal as being exemplary. This is applauded and seems to be your niche at the school. We congratulate you and thank you on behalf of all the students you have served, are serving, and continue to serve."

The Plaintiff filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC"), dated March 1, 2008. According to the Plaintiff, as a result of filing a complaint of discrimination, she was not paid for her work during summer school in 2008 until she filed a grievance.

According to the Defendants, each summer, West Side High School is provided with a personnel budget. McTavish does not utilize counseling services during summer school and instead chooses to allocate the school's resources to hiring teachers and as few administrative support positions as possible. As such, West Side High School did not have any vacancies for the

position of guidance counselor or social worker during the summer of 2008. The Defendants state that at the beginning of the summer 2008 session, McTavish was informed that the Plaintiff was told to report to West Side High School to work because she had what is known as "retention rights" to work per session during the summer. Retention rights guarantee certain employees, based upon seniority, to be paid for summer school permitting they apply, whether or not they are accepted for a summer school vacancy. The Plaintiff was not to be paid from West Side High School's budget for the summer session because West Side High School was not budgeted for the position of guidance counselor. Instead, funding had to be transferred to the school's account from BOE central so that the Plaintiff could be paid.

The Plaintiff has stated that at the beginning of the summer of 2008, the Plaintiff was informed that she was to report to West Side High School to work as a guidance counselor during the summer session. According to the Plaintiff, her retention rights allowed her the right to work per session during the summer. The Plaintiff states that the funding issues caused the Plaintiff not to be paid for her work during the summer 2008 school session until October of 2008, thereby causing her to incur excess interests on her credit cards and

bills. According to the Plaintiff, she was the only African-American and the oldest worker who was not paid for the summer 2008 school session.

According to the Defendants, on July 29, 2008, the Plaintiff sent an email to Lauren Lewis ("Lewis") in BOE's Central Human Resources Department stating in part:

> You called me on July 2, [20]08 and told me by voicemail and followed by an email confirmation to report to [West Side High School] for my summer assignment. I did on report July 2, [20]08. However, today the payroll secretary Barnard MCGlockling (who also email you with the question who will pay my summer pay 7/21/08?) inform me checking the computer system there is no paycheck for me. I would like to know if your office has paid me for July 1, 08 to July 15, 08.

In response to the Plaintiff's July 29, 2008 email, Lewis sent an email: "Hello. I have check the summer school system to see if you responded in time. You did not. Please call me to discuss this matter."

The Plaintiff's union filed a grievance regarding her per session pay for summer school in 2008, which McTavish supported by stating at the grievance hearing that she believed the Plaintiff should be paid for the entire summer because she

worked for the entire summer. The Plaintiff has denied this assertion. The Plaintiff was fully paid in October 2008 for her work during summer school during the summer of 2008.

The Plaintiff also contends that she was denied employment during the summer of 2009. According to the Plaintiff, on June 25, 2009, Jones was offered the job of transition person, a "comp time" teaching position, but she refused the position because a transitional teacher is a teaching job that has a lower education requirement and salary that that of a guidance counselor. Jones has stated that during the summer 2009 session, she applied to work as a guidance counselor in a timely fashion and, notwithstanding the fact that she had retention rights, was not contacted regarding her summer assignment until August 7. Even though the final day of the summer 2009 session was August 14, the Plaintiff states that she still reported to her assignment on August 8. Jones contends that because she had retention rights, she was still entitled to payment for the entire summer. The Plaintiff was ultimately paid for the summer 2009 school session in October 2009. According to the Plaintiff, this delay in payment again caused her to incur excess interest charges on her credit accounts and bills.

The Plaintiff has filed two grievances pursuant to Article 7 of the applicable collective bargaining agreement ("CBA"), challenging her assignment to administrate the GED predictor test to students. The first hearing occurred on November 12, 2008 when Chancellor's Representative Gary S. Laveman ("Laveman") presided and the Plaintiff, UFT Representative Jeffrey Huart, Reformato, Mandel and McTavish were all in attendance. The Plaintiff and her union argued that the Plaintiff was required to administer GED predictor tests to students in violation of the CBA. By decision dated November 18, 2008, the grievance was denied, both on procedural and substantive reasons. Laveman found, in part:

> At no time was [plaintiff] required to schedule large-scale testing programs, such as Regents examinations, or to proctor or grade such examinations. The occasional testing of students was done strictly for diagnostic purposes, which then enabled counselors, such as [plaintiff] to better advise students. Nothing is remiss in this.

On February 12, 2009, Chancellor's Representative Alex Tare presided over the second grievance, where the Plaintiff, UFT representative Danile Acosta, Kshensky and McTavish were in attendance. The Plaintiff and her union argued that the Plaintiff was improperly assigned to administer the GED predictor test to a large number of students making it

impossible for the Plaintiff to perform her guidance duties. Tare denied the grievance, finding in part:

> Administering the GED predictor test seems to be a reasonable duty for a high school guidance counselor. Further, Article 7 cited by the Union states "Counselors shall not be required to schedule and administer large-scale testing programs...." That does not seem to be the case here.

Additionally, Tare noted that:

> [T]he Union brought this identical grievance on behalf of this same grievant three months ago. That first grievance included the same complaint, the same cites Articles and the same request for relief as the present grievance. That grievance was denied. The Union cannot grieve the same grievance on behalf of the same grievant time after time. The Agreement provides an appropriate alternative for the Union to pursue if it is displeased with a Step II decision.

The Plaintiff has alleged in her Amended Complaint that "the assignment forced on me as a GED tester since 2003 is racial discrimination and age discrimination." When asked at her deposition why she believed the assignment to be discriminatory, Plaintiff testified:

> I am African-American, I am the first and only African-American at this School. And the other people were not given these tests in the school, and the other social workers were not given these tests. The

> younger Caucasian social workers did not give these tests. They were ordering me with the principal and attendance teacher to give these tests. They were ordering me with the principal and attendance teacher to give these tests.

When asked to explain her testimony that the Plaintiff was the "first and only African-American at this school," the Plaintiff testified that she is the only African-American guidance counselor at the school but testified that there are other African-American employees at the school, including Rivers. When asked whether there were other reasons the Plaintiff believes she was discriminated against, the Plaintiff testified that "it was the comments and the actions of younger Caucasian people giving me orders and when I said something they would run to the principal." With respect to her claim of race or age discrimination concerning her assignment to work with students interested in taking the GED predictor tests, the Plaintiff testified "the idea that I had lesser and lesser mandated students. I was like the old horse put out to pasture." The Plaintiff has alleged that "the lower status job as a 'GED Tester' forced on me is a violation of my contractual-guidance counselor contractual rights to due process and equal protections under the law."

After Plaintiff's retirement in September 2010, McTavish hired Tyler Small ("Small") as the school's only guidance counselor. The race of Small is Caucasian, and he was born in the year 1966. Small was hired, and he took over the responsibility to administer the GED predictor tests, in addition to working with student programming, and helping students with their schedules. According to the Defendants, one of the reasons McTavish hired Small was because he had experience at his prior school in administering and counseling students with regard to the GED predictor test. The Plaintiff has denied this assertion. The Defendants claim that, while Small is currently assigned eleven mandated students, the majority of mandated students continue to work with the social workers employed at West Side High School. The Plaintiff has denied this assertion.

**The Applicable Standard**

Claims of Title VII and ADEA discrimination are analyzed under the burden-shifting framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See Woodman v. WWOR-TV, Inc., 411 F.3d 69, 76 (2d Cir. 2005) (and cases cited therein recognizing that the framework established by McDonnell

Douglas for Title VII claims of race discrimination also applies to ADEA claims); see also Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 110 (2d Cir. 2010). To establish a prima facie case of discrimination, Plaintiff must point to evidence in the record showing that: (1) she is a member of a protected class; (2) she was qualified for her position; (3) she was subjected to an adverse employment action; and (4) the adverse employment action took place under circumstances giving rise to an inference of discrimination based on Plaintiff's membership in the protected class. See Gorzynski, 596 F.3d at 107 (citing Carlton v. Mystic Transp., Inc., 202 F.3d 129, 134 (2d Cir. 2000)); see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); Stern v. Trs. of Columbia Univ., 131 F.3d 305, 311-12 (2d Cir. 1997).

If Plaintiff meets this burden of production with respect to the prima facie case, then the burden shifts to the employer to show that any adverse employment actions were taken for legitimate, non-discriminatory reasons. St. Mary's Honor Ctr., 509 U.S. at 507. Once the defendants produce such evidence, "the presumption raised by the prima facie case is rebutted, and drops from the case." Id. At that point, "the governing standard is simply whether the evidence, taken as a whole, is sufficient to support a reasonable inference that

prohibited discrimination occurred." James v. N.Y. Racing Ass'n, 233 F.3d 149, 156 (2d Cir. 2000). Once the employer has demonstrated a legitimate, non-discriminatory reason for its decision, the burden then shifts back to the plaintiff to present evidence that the employer's proffered reason is a pretext for an impermissible motivation. Vivenzio v. City of Syracuse, 611 F.3d 98, 106 (2d Cir. 2010). A plaintiff cannot establish a prima facie case based on "purely conclusory allegations of discrimination, absent any concrete particulars." Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985).

**The Defendants' Motion For Summary Judgment Is Granted With Respect To All Claims Against The Individual Defendants**

Plaintiff asserts claims under Title VII and ADEA against individually named defendants Kaplan, Cookler, McTavish, Brodsky, Kshensky, Tare and Mandel (collectively, the "Individual Defendants"). The Second Circuit and this court have held that Title VII and the ADEA only allow a cause of action against an "employer." See Wrighten v. Glowski, 232 F.3d 119, 120 (2d Cir. 2000) (per curiam) ("The district court also properly dismissed the Title VII claims . . . because individuals are not subject to liability under Title VII."); see also Healy v. AIG Tech. Servs. Inc., No. 00CIV3419(GBD), 2001 WL

336976, at *1 (S.D.N.Y. Jan. 10, 2001). An "employer" is not construed to mean a supervisor or other agent of the entity that employs the plaintiff. See Pasqualini v. MortgageIT, Inc., 498 F. Supp. 2d 659, 665 (S.D.N.Y. 2007) ("[I]t is established well beyond the need for citation that this Court is without power to overrule a decision of the Second Circuit, which has repeatedly held that an employer's agent may not be held individually liable under Title VII.") (citations omitted). Because only an employer, and not individuals, can be the defendant in a Title VII or ADEA case, all claims against the Individual Defendants must be dismissed.

The Plaintiff, in opposition to the Defendants' motion has invoked the jurisdiction of this court pursuant to 42 U.S.C. §§ 1981 and 1983 to assert individual liability. However, because this is the first time the Plaintiff has asserted these claims, it is tantamount to an amendment of the Amended Complaint which at this stage is not permissible. See Davis v. City of New York Health & Hosps. Corp., No. 08 Civ. 0435(LAP), 2011 WL 4526135, at *1 n.1 (S.D.N.Y. Sept. 29, 2011) ("Plaintiff concedes that she did not allege a cause of action under [the Whistleblower Law] in the complaint but asks that her other claims be construed to include one or that she be permitted to amend. . . . As parties may not amend complaints by way of

summary judgment briefing, no claim under that section is before the Court.") (citing Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir. 1998)); see also 49 WB, LLC v. Village of Haverstraw, No. 08 CV 5784(VB), 2012 WL 336152, at *12 (S.D.N.Y. Feb. 2, 2012) ("The complaint does not allege a conspiracy including those non-parties, and the Court will not permit plaintiff to amend its complaint in its opposition to summary judgment.").

**The Defendants' Motion For Summary Judgment Concerning The Plaintiff's Discrimination Claims Is Granted With Respect To All Defendants**

In addition to the applicable precedent precluding the Plaintiff's claims against the Individual Defendants, the Defendants' summary judgment motion is granted with respect to all Defendants because the Plaintiff has neither established a prima facie case of discrimination, nor has the Plaintiff presented evidence that the DOE's proffered reason for its actions concerning Jones is pretext for an impermissible motivation.

**A. The Plaintiff Has Failed To Establish A Prima Facie Case Because There Is No Evidence That Jones Suffered An Adverse Employment Action**

Plaintiff's additional job assignment to administer the GED test does not constitute an adverse employment action under Title VII or the ADEA. An adverse employment action is a "materially adverse change in the terms and conditions of employment," something "more disruptive than a mere inconvenience or an alteration of job responsibilities" such as "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Galabya v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (citations omitted). As such, "a job re-assignment, without attendant materially adverse consequences, is not an adverse employment action." Chandler v. AMR Am. Eagle Airline, 251 F. Supp. 2d 1173, 1183 (E.D.N.Y. 2003) (citing Galabya, 202 F.3d at 640.

The Plaintiff asserts that she suffered an adverse employment action as a result of the "diminution of Plaintiff's professional status." The Plaintiff's support for this purported diminution is based solely on her own subjective feelings about the job duties assigned to her. A change in an employees' job duties is not a sufficiently adverse change "unless the change is 'so unsuited to plaintiff's skills as to

constitute a setback to plaintiff's career,'" see Velasquez v. Gates, No. 08 CV 2215(CLP), 2011 WL 2181625, at *10 (E.D.N.Y. June 3, 2011) (citing Morrison v. Potter, 363 F. Supp.2d 586, 590 (S.D.N.Y. 2005)), and "a plaintiff's subjective feelings cannot be used to determine whether an employment action is adverse," see Islamic Soc'y of Fire Dep't Pers. v. City of New York, 205 F. Supp. 2d 75, 84 (E.D.N.Y. 2002) (citations omitted). Furthermore, a "bruised ego," a "demotion without change in pay, benefits, duties, or prestige," or "reassignment to [a] more inconvenient job" are all insufficient to constitute a tangible or materially adverse employment action. See Burlington Indus. v. Ellerth, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

Here, the evidence establishes that the Plaintiff never received disciplinary charges, a reprimand, a negative employment evaluation, or a negative letter to her personnel file. The Plaintiff was not terminated, nor was her salary ever reduced, nor was she demoted. Instead, the Plaintiff complains about having to administer GED predictor tests to students, which the Plaintiff alleges diminished her responsibilities. However, although the Plaintiff's caseload of mandated students was reduced to permit her additional time to work with students to prepare for the GED test, she continued to be assigned to

mandated students throughout her tenure and was able to counsel these students while fulfilling her job duties of counseling students who were preparing for the GED exam. As such, the added job duties of counseling students who were interested in taking the GED did not alter the terms and conditions of her employment. The Plaintiff continued to perform work in the licensed area of guidance counselor. The Plaintiff was the only guidance counselor at West Side High School from 2006 until 2010, and the guidance counselor who was hired after Plaintiff retired has the same job duties as plaintiff and approximately the same number of mandated students.

**B. Even If A Prima Facie Case Is Assumed, The Plaintiff Has Failed To Present Evidence That The Defendants' Proffered Reasons For Jones' Reassignment Are Pretextual**

Even if it is assumed that the Plaintiff has established an adverse employment action, the Defendants' motion for summary judgment must still be granted because the Plaintiff has failed to present evidence that the Defendants' proffered reasons for the change in Jones' duties are pretext for an impermissible motivation.

As described above, under the McDonnell Douglas analysis, a plaintiff must first establish a prima facie case of

discrimination. After the plaintiff has satisfied this initial burden, the burden of going forward shifts to the defendant to provide a legitimate non-discriminatory reasons for the adverse employment action. See, e.g., Patterson v. County of Oneida, 375 F.3d 206, 221 (2d Cir. 2004). This showing must be supported by admissible evidence that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. The plaintiff then has an opportunity to demonstrate that the defendant's reasons were merely a pretext for discrimination. See id.

Here, the evidence the Plaintiff cites to establish a prima facie case is that white social workers who were younger than the Plaintiff were assigned the Plaintiff's counseling duties; that McTavish allegedly attempted to remove the Plaintiff, who was the only black guidance counselor, from West Side High School; that McTavish often stated during morning meetings that "we old people should just step back and let them [younger professionals] take over;" and that when the Plaintiff retired, McTavish hired Small, who is Caucasian and younger than the Plaintiff, to serve as a guidance counselor at West Side High School. Even if it is assumed that this evidence is sufficient to establish a prima facie case of discrimination, the Defendants have provided a legitimate non-discriminatory

reason for Jones' reassignment, and the Plaintiff has failed to demonstrate that the Defendants' reasons were merely a pretext for discrimination.

Assuming that the Plaintiff has established a prima facie case of discrimination, the Plaintiff's claims fail because the Defendants have articulated legitimate, nondiscriminatory reasons for the actions taken with regard to the Plaintiff. The Defendants' burden in this regard is minimal as they must merely provide some explanation for the actions Plaintiff alleges to be discriminatory. See Bickerstaff v. Vassar Coll., 196 F.3d 435, 446 (2d Cir. 1999) ("The defendant's burden of production is also not a demanding one; she need only offer such an explanation for the employment decision."). The Defendants have contended that, although the Plaintiff had been counseling mandated students prior to McTavish becoming her direct supervisor, McTavish preferred to have social workers counsel mandated students. The Defendants further explain that soon after the Plaintiff was assigned to work at West Side High School full-time, the Plaintiff, on her own initiative, began providing West Side High School students the opportunity to take the GED predictor test. McTavish encouraged the Plaintiff to council students who were interested in taking the GED test, and McTavish and her staff encouraged more students to take the GED

predictor exam. In order to permit her more time to work with the additional students to take the GED predictor test, McTavish reduced the Plaintiff's caseload of mandated students and reduced the Plaintiff's caseload of mandated students. The Defendants also note that Small was hired at West Side High School to replace the Plaintiff after she retired, and he also administers the GED predictor test in addition to maintaining a similar caseload of mandated students.

After articulating their legitimate non-discriminatory reasons, the Defendants are entitled to summary judgment unless Plaintiff can point to evidence supporting a finding of discrimination. James, 233 F.3d at 154 ("Thus, once the employer has proffered its nondiscriminatory reason, the employer will be entitled to summary judgment . . . unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination."). For the Plaintiff to show that the Defendants' nondiscriminatory reasons are pretextual, she must show "'both that the reason was false, and that discrimination was the real reason.'" Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1225 (2d Cir. 1994) (quoting St. Mary's Honor Ctr., 509 U.S. at 515). In response to the Defendants' proffered reasons, the Plaintiff contends that "jurors may reasonably infer from the available facts, that

Plaintiff was subjected to race and age discrimination by virtue of her being pushed out of her guidance counselor position and into that of a mere test administrator in favor of white and younger social workers, who were not verified guidance counselors."

However, the Plaintiff continued to serve in the title of guidance counselor and performed duties consistent with the guidance counselor title. In addition, Rivers, the second social worker hired by McTavish, whose race is African-American, and who was born in the year 1955, has a large caseload of mandated students for counseling services. The Plaintiff's subjective belief that she was more qualified to work with mandated students at West Side High School than the clinical social workers employed in the school is insufficient to establish pretext. See Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001). The Plaintiff has contended that the hiring of Small, a younger and Caucasian guidance counselor, is indicative of McTavish's preference for a guidance counselor who is white and much younger. However, the evidence establishes that Small has a caseload of mandated students similar to that of the Plaintiff and continued to administer the GED predictor tests to students at West Side High School. While the Plaintiff has alleged that McTavish has stated that "we old

people should just step back and let them [younger professionals] take over," the comment is a stray remark, and is insufficient to establish pretext. See Fried v. LVI Servs., Inc., No. 10 Civ. 9308(JSR), 2011 WL 4633985, at *9 (S.D.N.Y. Oct. 4, 2011) ("However, stray remarks, even if they occurred as plaintiff claims, are not enough to satisfy the plaintiff's burden of proving pretext. Stray remarks alone do not create an issue of material fact to defeat summary judgment.").

As such, even if a prima facie case is assumed, the Defendants' motion for summary judgment is granted because the Plaintiff has failed to present evidence that the Defendants' proffered reasons for the change in Jones' duties are pretext for an impermissible motivation.

**The ADEA Claims Are Dismissed For Lack Of Economic Loss**

In addition to the reasons described above, the Plaintiff's ADEA claims must be dismissed because Jones has failed to allege any economic loss. Any ADEA claim where the plaintiff has been fully compensated during the period of employment must be dismissed, as the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress. See Castro v. City of New York, No. 09

Civ. 3754(PAE), 2012 WL 592408, at *1 (S.D.N.Y. Feb. 24, 2012) (collecting cases). In this case, the Plaintiff has alleged that she was discriminated against on the basis of her age, but has not alleged that she suffered a reduction in pay, or any other monetary losses, as a result of race or age discrimination. Because the ADEA only permits recovery for back pay, front pay, and liquidated damages, the ADEA claim must be dismissed in its entirety.

**Retaliation Has Not Been Established**

In addition to her allegations of race and age discrimination, the Plaintiff alleges that she was retaliated against for complaining about the discrimination to which she was subjected. To establish a prima facie case of retaliation under Title VII, the same burden-shifting McDonnell Douglas framework described above applies, and the plaintiff must first show that she was (1) engaged in an activity protected under anti-discrimination statutes, (2) the defendant was aware of the plaintiff's participation in the protected activity, (3) the defendant took adverse action against the plaintiff based upon his activity, and (4) a causal connection existed between the plaintiff's protected activity and the adverse action taken by the defendant. See Cosgrove v. Sears, Roebuck & Co., 9 F.3d

1033, 1039 (2d Cir. 1993). Again, as noted above, once the plaintiff establishes a prima facie case, the burden shifts to the defendant to establish legitimate, non-retaliatory reasons for its actions. Id. Finally, the plaintiff must then prove that the proffered reasons are pretext for retaliation. Cifra v. Gen. Elec. Co., 252 F.3d 205, 216 (2d Cir. 2001) (applying the burden-shifting framework to a Title VII retaliation claim).

To establish that the Plaintiff suffered an adverse employment action for the purposes of a retaliation claim, the Plaintiff must demonstrate that the employment action is "materially adverse," in that the action is likely to dissuade "a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Sante Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). However, "petty slights or minor annoyances" are not actionable as claims of retaliation. See Burlington Northern, 548 U.S. at 68; see also Cody v. County of Nassau, 345 Fed. Appx. 717, 719 (2d Cir. 2009) (holding that "(1) falsely accusing [the plaintiff] of being absent without authorization, (2) threatening [the plaintiff] with future counseling notices and disciplinary actions, (3) writing [the plaintiff] up for leaving work early, (4) placing [the plaintiff] on a medical review list, (5) issuing [the plaintiff] a counseling notice while [the

plaintiff] was on leave, and (6) engaging in a pattern of conduct that created a hostile working environment including altercations" not adverse employment actions for purposes of a retaliation claim).

The Plaintiff claims that she was subjected to retaliation for her complaint of discrimination in three ways. First, the Plaintiff alleges that, after she complained to Kaplan on February 26 about the younger and less-qualified social workers intervening with her mandated students, Kaplan sent an email to both the Plaintiff and McTavish in which Kaplan falsely claimed that the Plaintiff stated that she offered aromatherapy treatment to her students, and he chastised Jones for doing so. The Plaintiff contends that, during their February 26 meeting, Kaplan asked Jones about the scent in her room and the Plaintiff informed Kaplan that the formal name of the scent was "aromatherapy." According to the Plaintiff, "[j]urors will likely be struck by the tone of Kaplan's missive and its emphasis on matters other than the specifics of plaintiff's Complaint. This raises a fair inference of retaliatory animus." Second, the Plaintiff alleges that after she filed her March 2008 complaint with the EEOC, her paycheck for her work during the summer of 2008 was delayed, resulting in her incurring excess interest on her credit cards and bills.

The Plaintiff contends that this delayed payment was in retaliation for her complaint. Finally, the Plaintiff contends that she was denied summer employment in 2009 notwithstanding her right to receive a summer position.

As described above, petty slights and minor annoyances do not constitute retaliation. With respect to the Plaintiff's first alleged example of retaliation, the tone of an email is insufficient to raise retaliatory animus. With respect to the Plaintiff's second and third allegations of retaliation, it must be noted that the Plaintiff acknowledges that she was fully paid for her work during the summer of 2008 in October 2008 and fully paid for her work during the summer of 2009 in October 2009. A mere delay in receiving a paycheck is not an adverse employment action sufficient to state a claim of retaliation. See Rasco v. BT Radianz, No. 05 Civ. 7147(BSJ), 2009 WL 690986, at *17 (S.D.N.Y. Mar. 17, 2009) ("Courts in this Circuit have held that a delay in transmitting a paycheck is not a materially adverse action under Title VII."); Sprott v. Franco, No. 94 Civ. 3818(PKL), 1997 WL 79813, at *13 n.5 (S.D.N.Y. Feb. 25, 1997) ("Plaintiff has not argued, nor could she successfully argue that the paycheck incident was an adverse employment action. . . . Any delay in receiving the paycheck was a mere inconvenience to plaintiff.").

Additionally, the Plaintiff offers no direct evidence that the delay the Plaintiff experienced in receiving her 2008 summer pay was related to her filing a complaint of employment discrimination.[1] Instead, the Plaintiff relies upon the temporal proximity of her protected activity (filing the complaint with the EEOC in March 2008) and her alleged adverse employment action (failing to receive pay in a timely fashion for summer 2008 work). This temporal relationship, however, is insufficient. When a plaintiff attempts to establish a causal connection through temporal proximity alone, the temporal relationship between the protected activity and adverse action must be "very close." See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001); Hollander v. Am. Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) (finding a period of three to four months insufficiently proximate to support claim). District courts in this circuit

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[1] With respect to the delay in her summer 2009 payment, the Plaintiff offers no factual support concerning her allegations of retaliatory animus, instead connecting the retaliatory motive for the 2008 delayed payment with the 2009 delayed payment. See Pl.'s Memo. at 24 ("As proof positive that this was not some administrative fluke, plaintiff was subjected to similar mistreatment the following summer. . . [O]nce again, plaintiff was not paid for the summer 2009 school session until October of 2009, once again causing excessive interests on her credit cards and bills.").

consistently have found that an intervening period of more than two to three months is insufficient to establish a causal connection through temporal proximity alone. See Ragin v. E. Ramapo Cent. Sch. Dist., No. 05 Civ. 6496(PGG), 2010 WL 1326779, at *24 (S.D.N.Y. Mar. 31, 2010) (collecting cases and noting that although the Second Circuit has not drawn a bright line to define the outer limits for causality based on temporal proximity, "many courts in this circuit have held that periods of two months or more defeat an inference of causation"). Here, the Plaintiff filed a discrimination complaint on March 30, 2008, and was not paid for summer school in July 2008, four months after the Plaintiff's protected activity.

Even if it is assumed that the Plaintiff has offered a prima facie case of retaliation, the Defendants have proffered an explanation for the delay in payment that is not based in retaliatory animus. McTavish has stated that she does not utilize counseling services during summer school, instead choosing to allocate school resources to hiring teachers and as few administrative support positions as possible. As such, West Side High School did not have vacancies for the position of guidance counselor or social worker for the summer of 2008. However, McTavish was informed that the Plaintiff had retention rights to work per session during the summer. Retention rights

are defined by regulation, and when an employee has retention rights in a particular activity, the employee must be assigned to work for the entire duration of the activity. McTavish was informed that the Plaintiff was directed to report to West Side High School because of her retention rights and that the Plaintiff would be paid from a source other than West Side High School's budget.

As further evidence of the Defendants' legitimate explanation, the Defendants highlight an email the Plaintiff wrote dated July 29, 2008, to Lauren Lewis in BOE's Central Human Resources Department stating, in part:

> You called me on July 2, [20]08 and told me by voicemail and followed by an email confirmation to report to [West Side High School] for my summer assignment. I did on report July 2, [20]08. However, today the payroll secretary Barnard MCGlockling (who also email you with the question who will pay my summer pay 7/21/08?) inform me checking the computer system there is no paycheck for me. I would like to know if your office has paid me for July 1, 08 to July 15, 08.

In response to the Plaintiff's July 29, 2008 email, Lewis sent an e-mail: "Hello. I have check the summer school system to see if you responded in time. You did not. Please call me to discuss this matter." The Plaintiff's union filed a

grievance regarding Jones' per session pay for summer school in 2008, which McTavish supported by stating at the grievance hearing that she believed the Plaintiff should be paid for the entire summer. The Plaintiff was ultimately paid in October 2008.

The Plaintiff has failed to present any evidence establishing that the Defendants' reasons were pretextual or used to hide retaliatory animus. Because the Plaintiff cannot produce anything other than her own feelings and speculations that she was retaliated against, the Plaintiff's claims concerning the retaliation she allegedly suffered are dismissed. See Curtis v. Airborne Freight Corp., 87 F. Supp. 2d 234, 249 n.20 (S.D.N.Y. 2000) (noting that conclusory and speculative allegations of racial animus are insufficient to create an issue of fact).

**A Due Process Violation Has Not Been Established**

Finally, although the Plaintiff contends that the duty of administering GED testing violates the applicable collective bargaining agreement and deprives the Plaintiff of "due process and equal protection under the law," the Plaintiff has failed to allege facts sufficient to state a claim. The evidence

establishes that the Plaintiff never lost her salary or her license and, as such, was never deprived of a property interest. See O'Connor v. Pierson, 426 F.3d 187, 196 (2d Cir. 2005) ("To determine whether a plaintiff was deprived of property without due process of law in violation of the Fourteenth Amendment, we must first identify the property interest involved."). To the extent the Plaintiff was unhappy about her assignment, the collective bargaining agreement provided the process that Jones was owed, and the Plaintiff has failed to exhaust her administrative remedies.

Moreover, the Plaintiff had an adequate post-deprivation remedy in the form of an Article 78 proceeding in the event the Plaintiff believed that the process was somehow inadequate. See Giglio v. Dunn, 732 F.2d 1133, 1135 (2d Cir. 1984) ("Where, as here, Article 78 gave the employee a meaningful opportunity to challenge the voluntariness of his resignation, he was not deprived of due process simply because he failed to avail himself of the opportunity."); Cronin v. St. Lawrence, No. 08-CV-6346, 2009 WL 2391861, at *7 (S.D.N.Y. Aug. 5, 2009) ("because Plaintiff could have challenged his constructive termination in an Article 78 proceeding, Plaintiff has failed to state a claim for denial of due process."). The Plaintiff, however, failed to avail herself of this remedy.

In opposition, the Plaintiff contends that she was deprived of her property interest in her position as a guidance counselor. Given that the Plaintiff resigned her position, such a claim can be construed as a constructive discharge claim in which a plaintiff must demonstrate that her working conditions are "intolerable," meaning that a "'reasonable person in [plaintiff's] position would have felt compelled to resign.'" Benson v. N.Y. City Bd. of Educ., No. 02-CV-4756(NGG)(RML), 2006 WL 2853877, at *9 (E.D.N.Y. Sept. 29, 2006) (citing Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 608 n.9 (2d Cir. 2006).

However, a change in job duties, without alleging an intolerable work environment, cannot be grounds for an allegation of constructive discharge. See Stetson v. NYNEX Serv. Co., 995 F.2d 355, 360 (2d Cir. 1993) ("A constructive discharge generally cannot be established, however, simply through evidence that an employee was dissatisfied with the nature of his assignments."); Garrett v. Mazza, No. 97 Civ. 9148(BSJ), 2005 WL 2094955, at *3 (S.D.N.Y. Aug. 30, 2005) ("A claim of constructive discharge must be dismissed as a matter of law unless the evidence is sufficient to permit a rational trier of fact to infer that the employer deliberately created working

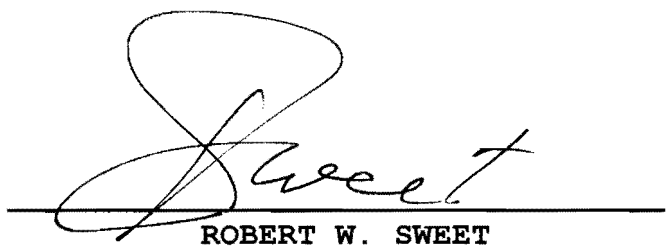
conditions that were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.") (citations omitted). Because the Plaintiff has failed to present evidence demonstrating an intolerable work environment, her due process claim is dismissed.

**Conclusion**

Based on the facts and conclusions set forth above, the Defendants' motion for summary judgment is granted and the Plaintiff's Amended Complaint is dismissed.

It is so ordered.

**New York, NY**
**March 30, 2012**



**ROBERT W. SWEET**
**U.S.D.J.**